

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Alexandria Division

UNITED STATES OF AMERICA)	
)	
v.)	No. 1:15cr293 (TSE)
)	
WAYNE SHELBY SIMMONS)	

**MOTION OF THE UNITED STATES FOR
AN EXTENSION OF TIME TO FILE RESPONSE**

The United States, through counsel, without objection from the defendant, hereby moves for an extension of time from February 27, 2017, to March 20, 2017, to file its response to the defendant's Section 2255 motion (DE 130, 131). The United States further requests the entry of a Court order as explained below. In support of this motion, the United States represents:

The defendant has filed a motion under 28 U.S.C. §2255 to vacate or set aside the 33-month sentence imposed by this Court on July 15, 2016 (DE 124, 127). The motion is based on the defendant's allegation that his attorney, Mr. William B. Cummings, failed to provide constitutionally effective assistance at sentencing. The motion makes three specific claims of deficient performance: (1) counsel failed to object to the admissibility of two shotguns seized at the defendant's residence; (2) counsel neglected to locate, interview, and subpoena witnesses for the sentencing hearing; and (3) counsel failed to turn over readily available documentary evidence for the sentencing hearing. The Court has ordered the government to respond to the motion by February 27, 2017.

The government believes that Mr. Cummings may have information that would inform the Court as to whether there are any factual bases to claims (2) and (3), above. In this regard,

Mr. Cummings has indicated to the government that he would review the motion and provide the government and the Court with any information relevant to the defendant's claims but only pursuant to a Court order. *See* Virginia State Bar Legal Ethics Opinion 1859, indicating that an attorney should disclose information relating to a claim of ineffective assistance "under judicial supervision in a formal proceeding" (June 6, 2010).

The United States submits that a Court order should be entered directing the defendant's counsel, Mr. Cummings, to provide the government and the Court with any information germane to an adjudication of the defendant's claims. Mr. Cummings is uniquely situated to know whether the allegations are, in fact, accurate. Moreover, the defendant has waived any attorney-client privilege with respect to these claims. *See La Borde v. Virginia*, 2011 WL 2358510 at *3 (E.D. Va. June 9, 2011) (holding that the filing of a habeas petition on grounds of ineffective assistance of counsel impliedly "waives the protection of the attorney client-privilege over information that is relevant to those claims"); *United States v. Pinson*, 584 F.3d 972, 978 (9th Cir. 2009) ("Given the ample, unanimous federal authority on point, we hold that when a habeas petitioner claims ineffective assistance of counsel, he impliedly waives attorney-client privilege with respect to communications with his attorney necessary to prove or disprove his claim."); *In re Lott*, 424 F.3d 446, 453 (6th Cir. 2005); *Bittaker v. Woodford*, 331 F.3d 715, 716-717 (9th Cir. 2003) (en banc); *Johnson v. Alabama*, 256 F.3d 1156, 1178 (11th Cir. 2001); *In re Sealed Case*, 676 F.2d 793, 818 (D.C. Cir. 1982). *See also* Va. R. Prof. Conduct 1.6(b) & (c) (listing instances in which disclosure of information otherwise protected by the Rule is permitted or required).

The United States requests that the deadline for filing a response to the defendant's motion be extended from February 27 to March 20, 2017, to give Mr. Cummings an adequate

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of February, 2017, I electronically filed the foregoing pleading with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to all counsel of record. I further certify that, on this same date, a copy of this pleading was sent by mail, postage prepaid, to Wayne S. Simmons, Reg. No. 21594-037, FCI Schuylkill, P.O. Box 670, Minersville, PA 17954.

By: /s/
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